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SECRETARY OF STATE  
OF CALIFORNIA

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: ) 1990 OAL Determination No. 6  
Request for Regulatory )  
Determination filed by ) [Docket No. 89-012]  
the Child Care Law Center )  
concerning Policy ) March 20, 1990  
Memorandum No. 88-11 )  
(entitled "Budget ) Determination Pursuant to  
Guidelines For Child ) Government Code Section  
Development Programs") ) 11347.5; Title 1, California  
issued by the Department ) Code of Regulations,  
of Education's Child ) Chapter 1, Article 2  
Development Division<sup>1</sup> )  
)  
)  
)

Determination by:

  
\_\_\_\_\_  
JOHN D. SMITH  
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Sherry Akrawi, Staff Counsel  
Rulemaking and Regulatory  
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SYNOPSIS

The issue presented to the Office of Administrative Law is whether the Department of Education's policy of (1) reviewing budget proposals submitted by child care providers for compliance with a stated range of costs and (2) requiring justification for deviation from such a range is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the policy as noted above is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

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THE ISSUE PRESENTED <sup>2</sup>

The Office of Administrative Law ("OAL") has been requested to determine<sup>3</sup> whether or not Policy Memorandum No. 88-11 ("Memo"), issued by the Child Development Division of the Department of Education ("Department"), is a "regulation" required to be adopted pursuant to the Administrative Procedure Act.

THE DECISION <sup>4, 5, 6, 7, 8</sup>

OAL finds that:

- (1) the Department's rules are generally required to be adopted pursuant to the Administrative Procedure Act ("APA");
- (2) the Memo is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) the Memo does not fall within any established exception to the APA; and therefore,
- (4) the Memo violates Government Code section 11347.5, subdivision (a).

R E A S O N S   F O R   D E C I S I O N

I. AGENCY; AUTHORITY; BACKGROUND

Agency

Created in 1921,<sup>9</sup> the Department of Education ("Department") was "vested with all the duties, powers, purposes, responsibilities, and jurisdiction of the State Board of Education . . . ." <sup>10</sup> The State Board of Education is the governing and policy determining body of the Department.<sup>11</sup> All the executive and administrative functions of the Department are delegated to the popularly-elected Superintendent of Public Instruction, who is the head of the Department and the executive officer of the State Board of Education.<sup>12</sup>

The duties of the Department include the administration, oversight, and coordination of various educational programs in state and local government.<sup>13</sup> Education Code section 33080 states the purpose of California's education system:

"Each child is a unique person, with unique needs, and the purpose of the educational system of this state is to enable each child to develop all of his or her own potential." [Emphasis added.]

The Department's programs are managed through seven branches. The Field Services Branch includes six divisions, one of which is the Child Development Division, which administers a variety of subsidized child care programs.

Child Care and Development Programs are administered by the Superintendent under the authority of the Child Care and Development Services Act, Education Code, sections 8200-8498.

The purpose of the Child Care and Development Services Act is to create:

"[a] comprehensive, coordinated, and cost-effective system of child care and development services for children to age 14 and their parents, including a full range of supervision, health, and support services through full- and part-time programs."<sup>14</sup>

The legislative intent behind the Child Care and Development Services Act is that:

"[a]ll families have access to child care and development services [and that] . . . [t]he

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Superintendent of Public Instruction, in providing funding to child care and development agencies, promote a range of services . . . ." <sup>15</sup>

Regulations concerning child care and development programs are set out in Title 5, California Code of Regulations ("CCR"), sections 18000-18308.

Authority <sup>16</sup>

Education Code section 8203 states in part that:

"The Superintendent of Public Instruction shall develop standards for the implementation of quality programs. Indicators of quality shall include, but not be limited to . . . efficient and effective local program administration." [Emphasis added.]

Education Code section 8255, subdivision (b), states it is the intent of Legislature:

"(1) That the State Department of Education develop clear, consistent, and appropriate regulations for child care and development programs to replace policy guidelines which are not subject to the public hearing process, often inconsistent, and without the force of law. . . . ." [Emphasis added.]

Education Code section 8261 states in part that:

"(a) The Superintendent of Public Instruction shall adopt rules and regulations pursuant to this chapter [Chapter 2, "Child Care and Development Services Act"]. The rules and regulations shall include, but not be limited to, provisions which do all of the following:

"(1) Provide clear guidelines for the selection of agencies when child development contracts are let, . . . ."

". . . ."

"(3) Specify adequate standards of agency performance."

". . . . "[Emphasis added.]

### Background

To facilitate understanding of the issues presented in this Determination, we set forth the following relevant statutes and regulations and undisputed facts.

Education Code section 8276.7 provides that ". . . [t]he administrative cost for all state-funded child care and development programs and all federal programs administered by the state shall not exceed 15 percent. . . ." (Emphasis added.)

Except for the above-quoted limitation on the portion of funds to be used for administrative costs, the Legislature has provided no statutory criteria for the allocation of costs within the two categories of "administrative costs" and "direct costs."

The CCR provisions for the award of funding for child care and development programs create a framework for the selection of contractors providing child care and development services. Title 5, CCR, section 18002 provides in part:

- "(a) An applicant must submit a completed application in accordance with the instructions contained in the Request for Applications. . . ." [Emphasis added.]

Title 5, CCR, section 18000 states:

"(f) 'Request for Applications' means an announcement issued by the Child Development Division for competitive award of a new contract for child care and development services or expansion of an existing level of services. The Request for Applications includes:

- (1) the application content requirements;
- (2) procedures for submission of an application for funding; and
- (3) the criteria to be used in evaluating the application." [Emphasis added.]

Although provision is made in the Request for Applications regulation (section 18000) for the development of criteria to be used in the evaluation of applications, there is no regulation specifically listing such criteria. Additionally, the Request for Applications is not incorporated by reference into the regulation.<sup>17</sup>

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In October 1988 the Child Development Division issued the challenged Memo. The heading of the Memo indicates that the subject is "Budget Guidelines for Child Development Programs" and the authority is "Supplemental Report to the 1985 Budget Act." The Memo states that "currently" contractors submit program budgets with their application for funding. Division staff then review the budget to

"ensure that expenditure totals are arithmetically correct, that planned expenditures are no greater than the projected income from all sources, and that administrative costs do not exceed 15%."

The budget guidelines proposed by the Memo would add ranges of costs for individual subcategories within the two categories of "administrative costs" and "direct costs." The Memo notes that "these guidelines are broad ranges for what are considered to be reasonable costs." (Emphasis in original.) Deviation from these ranges would have to be justified by the applicant.

"For the FY 1989-90 application renewal process, General Private, State Preschool and Campus programs will be required to submit budgets in accordance with these guidelines."<sup>18</sup> [Emphasis added.]

A review of the budget is one of the factors upon which the Department bases its decision on whether to offer a contract to an agency.<sup>19</sup>

The Department's concern about cost data apparently stemmed from comments made during the 1985-86 budget process. In the 1985 Analysis of the Budget Bill, the Legislative Analyst recommended that:

"the Legislature adopt supplemental report language directing the Department of Education to develop budget guidelines regarding the use of state funds by child care agencies, because some agencies have allocated an excessive amount of these funds to administrative costs."<sup>20</sup> [Emphasis added.]

The background given by the Legislative Analyst was that:

"Public and private agencies which provide child care services through contracts with the Department of Education receive state funds as reimbursement for the agencies' actual and allowable expenditures, up to a maximum amount specified in each agency's contract. Allowable expenditures are defined in the funding terms and conditions issued annually by SDE [State Department of Education]. Currently, however, there are no guidelines regarding the allocation of state funds to the various categories of allowable expenditures (such

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as administrative salaries, teacher salaries, and instructional supplies)." <sup>21</sup> [Emphasis added.]

This Determination focuses on the criteria used by the Department in the review of the proposed budget portion of an application.

Background: This Determination

On May 30, 1989, Abby J. Cohen, Managing Attorney for the Child Care Law Center, submitted to OAL a Request for Determination asking:

"whether the budget guidelines issued by the Department of Education, Child Development Division in CDD Policy Memo No. 88-11 . . . constitute 'underground regulation.'" [Emphasis added.]

The Requester stated:

"Clearly, SDE/CDD [State Department of Education/Child Development Division] has notified its contractors that non-compliance with the budget 'guidelines' may result in non-approval of their proposed budgets and program applications." [Emphasis added.]

On December 22, 1989, OAL published a summary of this Request for Determination in the California Regulatory Notice Register<sup>22</sup>, along with a notice inviting public comment.

On February 7, 1990, the Department filed a Response to the Request with OAL. The Department summarized its position regarding the Request as follows:

"The budget guidelines in Policy Memorandum No. 88-11 are not currently in effect and CDD [Child Development Division] does not intend to reissue them. There is no statutory or State budgetary language that requires CDD to continue to issue such guidelines. Consequently, this Department argues that the issue of whether those guidelines constituted regulations is moot." [Emphasis added.]

## II. ISSUES

Before turning to the dispositive issues of this Determination, we will address the Department's contention that the issue is moot because the Memo is no longer in effect.<sup>23</sup> We disagree with the argument that the issue is moot. Applicants which were required to comply with the budget guidelines have a right to a Determination of whether

or not the Department's policy of applying such guidelines was ever valid and enforceable. As stated in 1989 OAL Determination No. 17, "it is not up to [the Department] to decide that the Determination is moot. Moreover, like any other state agency, OAL is bound to follow its own regulations."<sup>24</sup>]

What do OAL regulations provide? Title 1, CCR, section 123, provides in part that:

"[a]ll requests for determination which meet the requirements of Section 122 of these regulations shall be considered by [OAL] in the order in which they are received." [Emphasis added.]

Received on May 30, 1989, the Request was found to meet the requirements of section 122 and was accepted by OAL in a letter dated June 5, 1989. On December 22, 1989, OAL commenced active consideration by publishing a summary of the Request in the California Regulatory Notice Register.

OAL is required to issue a written determination within a specified time frame after publishing notice of the request in the Notice Register. Title 1, CCR, section 126, provides:

"Within 75 days of the date of publication of the notice regarding the commencement of active consideration of the request for determination, the office shall issue a written determination as to whether the state agency rule is a regulation, along with the reasons supporting the determination." [Emphasis added.]

In a prior Determination, we concluded that "[t]he language of section 126 mandates the issuance of a written determination following notice of active consideration of the Request for Determination."<sup>26</sup>

Therefore, the determination duly requested by the Child Care Law Center must be rendered, even though the Department states that it does not intend to reissue the budget guidelines.

Next, we turn to the three main issues before us:<sup>27</sup>

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.



(3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY  
ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS APPLICABLE TO THE  
DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."<sup>28</sup> Since the Department is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.<sup>29, 30</sup>

Furthermore, Education Code section 8255, quoted above, directs the Department to develop regulations for child care programs which are consistent with the law and subject to the public hearing process. It is interesting to note that the Legislature, like the Requester, is concerned with the Department's issuance of guidelines which "are not subject to the public hearing process" and which "are without force of law."<sup>31</sup>

We are aware of no specific<sup>32</sup> statutory exemption which would permit the Department to conduct rulemaking without complying with the APA.<sup>33</sup> Arguably, a statutory exemption from the APA does exist for certain standards and criteria adopted by the State Board of Education. This exemption is found in Education Code section 33131. Education Code section 33131 states:

"The standards and criteria for fiscal accountability referred to in section 33127 shall not be subject to [the APA] . . . ." [Emphasis added.]

Education Code section 33127 provides for the development of standards and criteria by the Superintendent of Public Instruction, the Controller and the Director of the Department of Finance which are to be:

"reviewed and adopted by the State Board of Education and to be used by local educational agencies in the development of annual budgets and the management of subsequent expenditures from the budget . . . ." [Emphasis added.]

The challenged rule does not fall within the specific exception created by Education Code section 33131 for two reasons: (1) the Memo was not adopted by the Board of Education, and (2) the Memo does not apply solely to local educational agencies. First, the Department does not contend and there is nothing in the record to indicate that the Memo was adopted by the Board of Education. Second, the local educational agencies affected by Education Code section 33127 are county superintendents of schools and school district governing boards. The Legislative Counsel's

digest of the proposed statute provided the following background:

"Existing law requires the Superintendent of Public Instruction to approve or disapprove the budget of each county office of education, after examining it and suggesting any necessary technical corrections.

"This bill, instead, would require the Superintendent of Public Instruction to approve or disapprove the budgets on the basis of undefined standards and criteria for fiscal stability developed by the Superintendent of Public Instruction, the Controller, and the Director of the Department of Finance and reviewed and adopted by the State Board of Education." <sup>34</sup>  
[Emphasis added.]

In addition, Education Code section 33127 provides that the standards and criteria shall be used to monitor the fiscal stability of local educational agencies as provided for in a list of specified Education Code sections. These sections refer to the county board of education as the agency involved. Clearly the term "local educational agencies" as used in Code section 33131 means county offices of education which includes the county superintendents of schools and county boards of education.

The above-mentioned exemption does not apply to the challenged guidelines, because the exemption is limited to standards and criteria used to monitor the fiscal stability of county educational budgets.<sup>32</sup> In sharp contrast, the challenged guidelines are criteria used to evaluate applicants seeking to provide child care and development services.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

did not intend for the challenged guidelines to be merely informational or suggestive. In fact, the Memo outlines the two-fold purpose of the budget guidelines as assisting agencies in developing reasonable budgets and providing uniform provisions for evaluation of the application.

The challenged guidelines are not legally permissible under a statute that authorizes issuance of exemplary guidelines. Education Code section 33308.5 makes provision for program guidelines that are "merely exemplary":

- "(a) Program guidelines issued by the State Department of Education shall be designed to serve as a model or example, and shall not be prescriptive. Program guidelines issued by the department shall include written notification that the guidelines are merely exemplary, and that compliance with the guidelines is not mandatory." [Emphasis added.]

The challenged guidelines, unlike program guidelines issued pursuant to section 33308.5, do not contain any notice that they are not mandatory. The letter from Dr. Cervantes states ". . . the Budget Guidelines were incorporated into the application review process."<sup>35</sup> The letter further explains that "CDD's decision to offer a contract to an agency is based upon several factors." One of the factors is a determination of whether or not the proposed program is fiscally sound based on a review of the budget.

The budget guidelines are not merely examples of reasonable expenditures. They are standards that are applied in the review of an application to determine if the proposal is fiscally sound. The fact that the guidelines allow for variances does not remove them from the regulatory realm. The fact remains that any variances must be justified. Because the challenged guidelines are standards of general application which implement Education Code section 8261, they must be adopted pursuant to the APA.

WE THEREFORE CONCLUDE that the Department's policy of reviewing child care providers' applications for compliance with budget guidelines is a "regulation" as defined in Government Code section 11342, subdivision (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless they have been expressly exempted by statute from the application of the APA.<sup>36</sup> Rules concerning certain activities of state

- "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in the key provision Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of the inquiry is "yes." For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>33</sup> The guidelines challenged in the Request are applied to all child development agencies seeking to contract with the Child Development Division and, therefore, are rules of general application.

Having established that the challenged guidelines are rules of general application, we now inquire whether the guidelines have been adopted by the Department to implement, interpret, or make specific the law enforced or administered by the Department or to govern the agency's procedure. The answer to the second part of the two-part inquiry is also "yes."

The Department's budget guidelines implement, interpret, or make specific Education Code section 8261. As indicated above, section 8261 directs the Superintendent to adopt regulations containing guidelines for the selection of agencies for child development contracts.<sup>34</sup> The Department

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agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.<sup>37</sup>

The question arises as to whether or not the inclusion of the challenged guidelines in the Request for Application warrants exclusion from the APA pursuant to the "forms exception."

Government Code section 11342, subdivision (b) states:

"'Regulation' does not mean or include . . . any form prescribed by a state agency . . . but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued." [Emphasis added.]

Because the challenged guidelines are standards of general application which implement Education Code section 8261 (i.e., the guidelines "implement the law under which the form is issued"), they must be adopted pursuant to the APA. The act of including a regulation on a form does not exempt the regulation from compliance with the APA.<sup>38</sup>

Therefore, none of the recognized general exceptions (set out in note 37) apply to the challenged guidelines.

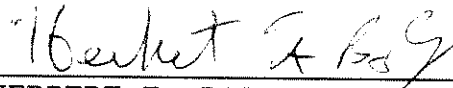
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III. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) the Department's rules are generally required to be adopted pursuant to the APA;
- (2) the Memo is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) the Memo does not fall within any established general exception to the APA; and therefore,
- (4) the Memo violates Government Code section 11347.5, subdivision (a).

DATE: March 20, 1990

  
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1. This Request for Determination was filed by Abby J. Cohen, Managing Attorney, Child Care Law Center, 22 Second Street, 5th Floor, San Francisco, CA 94105, (415) 495-5498. The Department of Education was represented by Michael E. Hersher, Staff Counsel, 721 Capitol Mall, P.O. Box 944272, Sacramento, CA 94244-2720, (916) 445-4694.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "146" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

Since August 1989, the following authorities have come to light:

(1) Los Angeles v. Los Olivas Mobile Home P. (1989) 213 Cal.App.3d 1427, 262 Cal.Rptr. 446, 449, the Second District Court of Appeal--citing Jones v. Tracy School District (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved)--refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing.

(2) Compare Developmental Disabilities Program, 64 Ops.Cal.Atty.Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as non-mandatory administrative "suggestions") with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal.Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a ['']regulation,[''] as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."  
[Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. Reflecting OAL's special expertise in deciding whether or not particular agency rules are subject to California APA requirements, regulatory determinations issued pursuant to Government Code section 11347.5 are--for five reasons--entitled to great weight in judicial proceedings. These five reasons are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No.



89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384. See also Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-3425 (interpretation of statute by agency charged with its enforcement is entitled to great weight).

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

OAL received no public comments on this Request for Determination.

The Department's Response to the Request for Determination was received by OAL on February 13, 1990, and was analyzed in this Determination.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for \$3.00.

9. Statutes of 1921, chapter 605, page 1033, section 1.
10. Education Code section 33306.
11. Id., section 33301.
12. Id., sections 33302 and 33303.
13. Generally set out in several sections of the Education Code.
14. Education Code section 8201.
15. Id., section 8202.
16. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

17. Title 1, CCR, section 20 states in part:

"(a) 'Incorporation by reference' means the method whereby a regulation printed in the California Code of Regulations makes provisions of another document part of that regulation by reference to the other document.

" . . . .

"(c). ~~An agency regulation incorporated by reference need only identify the document by title and date of publication or issuance.~~ . . . ."  
[Emphasis added.]

18. Memo, page 2.

19. This fact was stated in a letter from Robert A. Cervantes, Ph.D., Assistant Superintendent of the Child Development Division. A copy of the letter was submitted by the Register along with the memo and guidelines.

20. Page 1166 of the 1985 Analysis of the Budget Bill.

21. Pages 1166 and 1167 of the 1985 Analysis of the Budget Bill.

22. Register 89, No. 51-Z, p. 3348.

23. For examples of OAL rejection of similar technical objections see 1987 OAL Determination No. 3, (Department of Corrections, March 4, 1987, Docket No. 86-009), California

Administrative Notice Register 87, No. 12-Z, March 20, 1987, pp. B-76-81; typewritten version, pp. 3-9.

24. "It is by now axiomatic that agencies must comply with their own regulations while they remain in effect. [Citations.]" Memorial, Inc. v. Harris (9th Cir. 1980) 655 F.2d 905, 910, n. 14.
25. 1989 OAL Determination No. 17, (Department of Industrial Relations, Division of Labor Standards, December 29, 1989, Docket No. 89-005), California Regulatory Notice Register 90, No. 3-Z, January 19, 1990, p. 109; typewritten version, p. 588.
26. Id., typewritten version at page 589.
27. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
28. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
29. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
30. See Administrative Law, 10 Ops.Cal.Atty.Gen. 243, 245 (1947) which concluded that:

"The Administrative Procedure Act (Government Code, Title 2, Div. 3, Pt. 1, Chs. 4 and 5) in our opinion is applicable to the said regulations of the State Board of Education." [Emphasis Added]

31. See also Commission on California State Organization and Economy, "K-12 Education in California: A Look at Some Policy Issues," February 14, 1990. In this report, the Little Hoover Commission identified seven major problems with the operation of the Department of Education. The second of these seven perceived problems involved failure to comply with the APA (pp. 15-18). According to the Commission, the Department is "circumventing the State's regulatory process by issuing policy 'guidelines' to local education agencies; these 'guidelines' have the same effect as regulations but have not received public input or the legal scrutiny of the State's Office of Administrative Law." (p. 1.)
32. By "specific," we mean an exemption which pertains solely to one specific program or to one specific agency, such as the statute stating that the rule setting the California minimum wage is exempt from APA requirements (Labor Code section 1185). A specific exemption contrasts with a "general" exemption or exception, which applies across-the-board to all agency enactments of a certain type, such as those listed in note 37.
33. In Englemann v. Board of Education, Department of Education (No. 361906), the Sacramento Superior Court rejected the argument that the Board was exempt from APA rulemaking requirements because its textbook selection duties stemmed from the California Constitution. The Board and the Department have appealed the trial court decision; the opening brief has not yet been filed. The issue is the validity of written textbook selection guidelines.
34. Statutes of 1988, Chapter 1462.
32. Education Code section 33127.
33. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
34. Even if the Legislature had not expressly directed the Department to adopt regulations on this topic in Education Code section 8261, we would still conclude that the Department had violated Government Code section 11347.5. The specific Education Code mandate duplicates the general directive in the APA that "all" agencies observe the

specified "minimum" procedural requirements. See Government Code section 11346.

35. A letter from Robert A. Cervantes, Ph.D., Assistant Superintendent of the Child Development Division, was attached to the Request for Determination.
36. Government Code section 11346.
37. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
  - a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
  - c. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
  - d. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
  - e. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
  - f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA require-

ments); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5.

The above listing is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225.

The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

38. For further discussion of the "forms exception" see 1987 OAL Determination No. 16 (Board of Behavioral Science Examiners, December 4, 1987, Docket No. 87-005), California Administrative Notice Register 87, No. 52-Z, December 25, 1987, pp. 1058-1064, note 20; typewritten version, note 20, and 1987 OAL Determination No. 17 (Department of Motor Vehicles, December 18, 1987, Docket No. 87-006), California Regulatory Notice Register 88, No. 1-Z, January 1, 1988, pp. 113-114, note 34; typewritten version, note 34.
39. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong, Senior Legal Typist Tande' Montez, and Word Processing Technician Debbie Kunitake in the processing of this Request and in the preparation of this Determination.